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Nos. 399 and 294 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH ANTHONY ACCARDI, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN MORALES AND HERMAN JOHN DOMING, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 322-332; Pet. in No. 399, pp. 7-16) is reported at 257 F. 2d 168.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 333; Pet. in No. 399, p. 17). Petitions for rehearing (R. 334-345) were denied on August 27, 1958 (R. 346). The petitions for writs of certiorari were filed on September 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the issue of entrapment was properly submitted to the jury for resolution.

2. Whether there was sufficient evidence to connect petitioner Accardi (No. 399) with a conspiracy to acquire and transfer marihuana illegally.

STATEMENT

Accardi, Doming, Stephen "Steamboat" Morales, and Segro were charged in an indictment returned in the United States District Court for the Eastern District of Louisiana with a conspiracy to violate 26 U.S.C. 4744(a) and 4742(a), by illegally acquiring and transferring marihuana to one Picini (R. 2-5). Segro pleaded guilty (R. 6) and the other three defendants (Accardi, No. 399; Morales and Doming, No. 294 Misc.) were tried by a jury. The verdict was guilty as to all three petitioners, with a recommendation of leniency for Accardi (R. 16). Each petitioner was sentenced to imprisonment for five years (R. 313-316). On appeal (R. 316-317), the convictions were unanimously affirmed (R. 333; Pet. in No. 399, pp. 7-16).

1. The pertinent evidence for the prosecution may be summarized as follows:—

Michael Picini, the principal government witness, was a federal narcotics agent, working as an undercover man in Memphis, Tennessee, with one Underwood, an informant and special employee of the Bureau of Narcotics (R. 47-48, 49, 138, 139, 206-207). Collier, Underwood's employer, had been under investigation as a narcotics law violator (R. 140, 150, 50).

On May 4, 1955, acting upon information furnished by Collier, Picini and Underwood went to Accardi's place of business, the Bluff City Refrigeration Company in Memphis, where Underwood introduced Picini to Accardi as Mike Philano of Philadelphia. Picini stated that Collier had said that Accardi could supply him (Picini) with marihuana (R. 48, 49, 50-51, 71, 141-142). Although replying that he had no marihuana at the time, Accardi volunteered the statement that "he had a connection in New Orleans" (R. 61, 64, 65, 51). Since Accardi was reluctant to talk about the matter at his place of business, the parties went to a restaurant across the street where there was a discussion to the effect that Picini was looking for both heroin and marihuana (R. 51). Picini testified that in the restaurant he discussed with Accardi different models of deep freezes, with reference to a possible purchase for his wife, but that he did not promise that he was going to purchase one (R. 61, 72, 123). Underwood could recall no promise by Picini to buy a deep freeze, but only general conversation as to prices (R. 144-145).

Picini and Underwood agreed to meet Accardi at the Pig and Whistle restaurant in about an hour (R. 51-52). At this meeting place, Accardi drove up in his car to say that "he could not make any local contacts but he then advised that he would be able to—he thought that he could make contact in New Orleans" (R. 143). Accardi went into a drug store nearby, "looked into a little notebook and got a number", and put in a telephone call to New Orleans (R. 144, 52). Picini overheard Accardi ask for "Steamboat." On leaving the telephone booth, Accardi announced that he had been unable to get in touch with "his man" in New Orleans, but that he would try to reach him later. Accardi promised to meet Picini the following morning at the King Cotton Hotel where Picini had Room 619 (R. 52, 73-74, 144).

On the morning of May 5, 1955, Accardi met Picini according to their agreement, made another telephone call in the lobby of the King Cotton Hotel, and informed Picini that "he had made arrangements for someone in New Orleans to call [Picini] at Room 619" (R. 52, 77).

On the following day, May 6, a telephone message was left at the hotel for Picini to call "Steve" at Fillmore 1-8397 in New Orleans. When Picini called this number, Steve [Morales] stated that Accardi had left word for him to call. Steve asked what Picini wanted, and Picini said that he was looking for some marihuana and heroin. Steve stated, "Well, we can take care of you down here. How soon can you get down?" When Picini mentioned that he would call in a few days, Steve directed Picini to call the number

again and ask for "Steamboat" (R. 52-53, 78, 81, 129, 130).

On May 9 when Picini called the same number, "Steamboat" [Morales] announced that "he had made arrangements with guys across the river and that they could supply [Picini] with anything [he] wanted; for [Picini] to come to New Orleans." Picini stated that he was busy at the time, but that he would call "Steamboat" on May 13. On that date, Picini received a collect call from "Steamboat" to the effect that the boys were waiting for him and had the "stuff ready." Picini promised that he would leave Memphis that night (R. 53, 82, 129, 130).

On May 14, 1955 at about 11:00 a.m., Picini arrived in New Orleans and checked into a motel with three government agents who took a cabin adjoining Picini's. Picini telephoned "Steamboat," who put a man named Tony [Segro] on the line. By arrangement, "Steamboat" [Morales], "Zang" Doming, and Segro came to Picini's cabin. While "Steamboat" remained outside the cabin, Doming and Segro by negotiation agreed upon a price of $2,000 for four and a half gallons of marihuana to be delivered about 45 minutes later (R. 53-55, 83-84, 86-90, 163-164, 175-176, 183). After Doming, Morales, and Segro left in their Buick, Segro later returned to the cabin and told Picini to drive him to a certain street where the Buick was parked. Segro transferred the marihuana in a burlap bag from the trunk of the Buick to the trunk of Picini's car. Picini then got into the front seat of the Buick between Doming and Segro and paid Segro $2,000 (R. 55-56, 94-95).

The petitioners were not arrested at this time, and as late as June 18, 1955, Picini was negotiating with Doming and Segro for the purchase of heroin (R. 98-99). Picini testified that, about a week or two after the May 14th purchase, he telephoned Accardi to say that he had made the connection and purchase, and that he wanted to pay Accardi a fee for this. Accardi replied that he would get in touch with Picini later, but he never did (R. 63-64).

The government chemist testified that the substance purchased by Picini was marihuana (R. 193-195, 56-58). None of the defendants was able to produce a required order form for the transfer (R. 177-178, 186-187, 208-209).

2. All three of the petitioners testified on their own behalf:—

According to Accardi, Underwood introduced Picini to him as a friend from Philadelphia who wanted to purchase a deep freeze for his wife (R. 218). The parties left the restaurant across the street from Accardi's store, after Underwood had asked Accardi where he could purchase marihuana and Accardi had answered that he did not know of anyone who had any. In response to Picini's questioning about obtaining marihuana, Accardi stated, "Mike, I don't know nobody and I don't want to be associated with it. I'm in the refrigeration business" (R. 219-220). Accardi continued that "Mike kept egging me on to—if I knew of anybody he could buy marihuana from and I kept denying it and—so then it dawned on me that he might be able to get ahold of this fellow 'Steam-

boat' at the Sho-Bar Club [in New Orleans]" (R. 222). Accardi had met "Steamboat" in a crowded bar in New Orleans in 1954, and had been informed by the doorman that "Steamboat" might help "get some marihuana" (R. 221, 226-227). Accardi denied that he had known Doming and Segro before (R. 224-225). Accardi testified that, when Picini telephoned that he had made connections and wanted to pay a fee for Accardi's trouble, Accardi declined by saying, "I don't want to have none of that money; don't want to have nothing to do with it—this sort of a business" (R. 223-224).

Petitioner Morales testified that, when Accardi telephoned to ask if Morales could purchase marihuana, he stated that he had no connections and did not want to fool with it (R. 237). When Picini called about this subject, Morales answered, "No, I don't know anyone and I don't deal in that sort of business" (R. 239). When Picini called again to say that he was coming to New Orleans to talk to Morales, Morales remonstrated, "Well, I haven't got anything. It is no use you coming down" (R. 240). Morales stated that he contacted Segro to get marihuana just as a favor for Picini (R. 249).

Petitioner Doming testified that, when Segro asked about getting marihuana for Steve's friend from Tennessee, he (Doming) replied, "I don't want to have nothing to do with it" (R. 265), and that he refused a similar request by Morales (R. 266). Doming admitted, however, driving the automobile used in delivery of the marihuana and assistance in

the negotiations as to price (R. 270-271, 283-284, 267-268).

3. The three petitioners relied upon entrapment as a defense (R. 11-15), but they made no objection to the court's charge on this issue (R. 305-306, 308).

ARGUMENT

1. All three petitioners assert that there was entrapment as a matter of law, so that the case should not have gone to the jury at all (Pet. in No. 399, pp. 5-6; Pet. in No. 294 Misc., pp. 3-5). Accardi contends that he was entrapped, and Morales and Doming take the position that Accardi's entrapment "permeates the whole case" (Pet. in No. 294 Misc., pp. 2, 5) so that they were also entrapped as a matter of law.

Unlike *Sherman* v. *United States*, 356 U.S. 369, 373, where the determination that there was entrapment as a matter of law was predicated upon the "undisputed testimony of the prosecution's witnesses", there was here a square conflict between the testimony of government witness Picini and of petitioner Accardi. Picini's version was that, almost immediately after their first meeting, Accardi volunteered without hesitancy to telephone his New Orleans connection to arrange for sale of the marihuana to Picini. See also the Statement, *supra*, pp. 3-4. Accardia, on the other hand, testified that when first questioned about obtaining marihuana, he told Picini that he did not want to become involved in such an undertaking since he was in the refrigeration business; and that it was only after persistent questioning by Picini that Ac-

cardi thought of "Steamboat" Morales as a contact (Statement, *supra*, pp. 6-7). In view of this conflict in the evidence, the question was properly submitted to the jury for resolution. *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435.[1]

In order for the government to disprove the entrapment defense, it was not necessary to show that the petitioners had a predisposition to criminality by reason of a previous background in the narcotics traffic (see Pet. in No. 294 Misc., p. 4). The mere fact that a narcotics sale comes at the instance of a government agent does not show entrapment, nor is every first offender who deals with an agent necessarily entrapped. *Sorrells* v. *United States*, 287 U.S. 435, involved a situation where there was no proof of prior similar criminal activity by the accused, and so also did *Masciale* v. *United States*, 356 U.S. 386. In this case, to refute the defense of entrapment, the government evidence showed "ready complaisance" by petitioners in arranging and making the illegal narcotics sale. The prosecution had not seduced innocent persons, but had merely provided the means for petitioners to realize their preexisting purpose. Cf.

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[1] Apart from reliance upon Accardi's possible entrapment, petitioners Doming and Morales had no independent basis for urging that they were entrapped. Doming did not deal with Picini directly in setting up the sale; and although Morales testified that when Picini first contacted him, he denied dealing in marihuana (Statement, *supra*, p. 7), the jury was entitled to disbelieve this in view of Picini's contrary testimony (Statement, *supra*, pp. 4-5). Cf. *Masciale* v. *United States*, 356 U.S. 386, 388.

United States v. *Sherman*, 200 F. 2d 880, 882 (C.A. 2).[2]

2. The jury, by its verdict, necessarily credited Picini's testimony as against the conflicting testimony of petitioner Accardi. This disposes of the latter's contention (Pet. in No. 399, p. 5) that the evidence was insufficient to connect him with the conspiracy charged. According to Picini, on the day of his first meeting with Accardi the latter stated that he could make no local contacts for marihuana, but that he thought he could reach a contact in New Orleans. He proceeded to do this by making successive telephone calls until he reached "Steamboat" Morales, and made arrangements for Morales to telephone Picini at the hotel in Memphis (Statement, *supra*, pp. 3-4).

Accardi's activities were an important part of the conspiracy in enabling Morales to contact Picini, and make the arrangements which resulted in the ultimate sale of the marihuana. It is significant that by his own testimony Accardi admitted knowing Morales beforehand (R. 221). Unless Accardi had thought that

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[2] Petitioners Morales and Doming contend that the court erred in not instructing that the government had the burden of proving beyond a reasonable doubt that no entrapment existed (Pet. in No. 294 Misc., pp. 2, 5). Petitioners, however, made no objection to the court's charge as given (R. 308), and are in no position to challenge it now. Rule 30, F. R. Crim. P. The charge went thoroughly into the question of the necessity of the prosecution's proving every part of its case beyond a reasonable doubt (R. 293, 295-297), and covered in detail the defense of entrapment (R. 305-306, 308). Cf. *United States* v. *Sherman*, 200 F. 2d 880, 882-883 (C.A. 2), on the question of the burden of proof in regard to entrapment.

Morales was in a position to procure marihuana, he would not have telephoned him in New Orleans. Accardi's implication in the conspiracy is clear, since as soon as Morales was aware that Accardi was behind the transaction, his associates proceeded to make the sale to Picini. It is a fair inference that as narcotics traffickers they would not have done this if Picini had come to them as a total stranger, instead of being vouched for by Accardi.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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